

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	02cr20440 Ma/P
)	
YERVIN K. BARNETT)	
)	
Defendants.)	
)	

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Yervin K. Barnett, was indicted on November 15, 2002, for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The charge stems from an arrest of the defendant on the night of July 4, 2002, for burglary of a residence. On that night, Memphis Police Department ("MPD") officers seized a long gun and a television remote control. In addition, while in police custody, the defendant made statements to the police.

The defendant moved to suppress all evidence seized, and all statements made by the defendant, relating to his arrest on July 4, 2002. The defendant claims the arrest was illegal because the officers did not have probable cause that he committed any crime. The defendant contends that since the arrest was unlawful, any evidence obtained as a result of that arrest is inadmissible as

"fruits of the poisonous tree." In addition, the defendant claims any statements he made to police that night was in violation of his Miranda rights. The defendant's motion was referred to the United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

The court conducted an evidentiary hearing on the defendant's motion on June 18, 2003. The government called two witnesses during the hearing: Officer Corey Jefferson and K-9 Officer Jane Martin, both employed by MPD. The defendant did not call any witnesses, nor did he testify on his own behalf. The government introduced the following four exhibits at the hearing: one photograph of a residence alleged to be the home burglarized by defendant (Exhibit 1), and three photographs of a long gun recovered from the scene of the alleged burglary (Exhibits 2, 3, and 4).

After careful consideration of the statements of counsel, the testimony of the witnesses, the exhibits presented, and the entire record, this court submits the following proposed findings of fact and conclusions of law, and recommends that the defendant's Motion to Suppress be denied.

PROPOSED FINDINGS OF FACT

The testimony of the two law enforcement officers was consistent in all major details. This court finds the officers credible and adopts as fact their version of the events.

On the evening of July 4, 2002, Officer Corey Jefferson¹ responded to a prowler call at 661 Shell Lane in Memphis, Tennessee. When he arrived at the residence, Officer Jefferson turned on his spotlight and pointed it towards the house to confirm he was at the correct address. Upon doing so, Officer Jefferson observed a black male crouching in the bushes near a window at the front of the house. The suspect was wearing a white t-shirt and blue shorts. The suspect stood up, at which time Officer Jefferson observed a long black object in his hands, which appeared to be firearm. The suspect discarded the object in the front yard of the residence and began running west on Shell Lane.²

Officer Jefferson turned his patrol car around and gave chase. The suspect made his way to a gold colored Jaguar parked down the street, jumped in, and drove away. Officer Jefferson immediately activated his emergency lights and siren and pursued the suspect at speeds above the speed limit. He radioed other officers that he was in pursuit of the suspect. Officer Jefferson followed the vehicle to Hodge Street where the suspect lost control of his vehicle and struck a house. The vehicle continued to roll, at

¹Officer Jefferson has been with the Memphis Police Department for six years, and on the evening in question was assigned to work the South Precinct. He was not working with a partner that night.

²Officer Jefferson identified the long gun pictured in Exhibit 2 as the object the suspect discarded at the residence on the evening of July 4, 2002.

which time the suspect jumped out of the car and began running. Officer Johnson instructed another MPD officer who arrived on the scene to secure the vehicle, while Officer Jefferson began chasing the suspect on foot.

Officer Jefferson pursued the suspect on foot through residential yards. Officer Jefferson came to a fence that he was unable to scale, but watched the suspect continue to flee until he lost sight of him. Officer Jefferson, now joined by other officers, set up a perimeter around the area where he lost sight of the suspect. A canine unit was called to the area to aid the officers in searching for the suspect.

Canine Officer Jane Martin³ responded to the scene within minutes of receiving the call for assistance. Officer Martin spoke with Officer Jefferson before beginning to work the dog.⁴ Shortly thereafter, the dog picked up a scent track in the area where Officer Jefferson last saw the suspect running. The dog followed the track through several residential yards and across a street. Officer Martin observed footprints in the dew-covered grass in front of a home. The dog followed the track to a fence in the backyard of the home, where Officer Martin observed more footprints

³Officer Martin has been with MPD for twenty-five years, and has been a canine officer for the last fifteen years.

⁴Officer Martin's dog, Bryan, received one to two weeks of standard training on tracking. Officer Martin has handled Bryan for six of her fifteen total years with the canine unit.

on the other side in the back yard. Officer Martin picked up the dog and placed him over the fence, releasing his leash. The dog then ran into an open shed where the suspect was hiding, and bit the suspect. Officer Martin entered the shed, regained control of the dog, and ordered the suspect out of the shed and onto the ground.⁵

During her contact with the suspect in the shed, Officer Martin observed an object on the floor of the shed lying near the suspect. As other officers began arriving, Officer Martin removed the dog from the area while they took the suspect into custody. Officer Martin advised the other officers she had seen an object inside the shed, and instructed them to retrieve it. The item retrieved from the shed was a television remote control that Officer Martin later learned went with a television inside the home located at 661 Shell Lane. Officers also went to the residence at 661 Shell Lane and retrieved the long gun.

The defendant was brought back to Officer Jefferson, who identified the suspect as the individual who ran from him at the 661 Shell Lane residence.⁶ The officers placed the defendant in handcuffs and put him in the backseat of Officer Jefferson's squad

⁵Officer Martin testified that the defendant was wearing a white t-shirt and dark colored shorts.

⁶Officer Martin also made an in-court identification of the defendant at the suppression hearing, identifying the defendant as the same person he saw on July 4, 2002 at the 661 Shell Lane residence.

car.⁷ Officer Jefferson sat in the front seat of the cruiser filling out paperwork, but did not ask the defendant any questions.⁸ At some point, the defendant indicated to Officer Jefferson that his handcuffs were too tight. Officer Jefferson removed the defendant from the back seat and began adjusting his handcuffs. The defendant looked around the area and asked the officer whether he was the only person they caught. Officer Jefferson responded that the defendant was indeed the only person the police caught.⁹

PROPOSED CONCLUSIONS OF LAW

The defendant's Motion to Suppress raises three issues for consideration: 1) whether the warrantless arrest of the defendant was based on probable cause, 2) whether the evidence obtained during, or subsequent to, the arrest is inadmissible as "fruits of the poisonous tree" and 3) whether the statements made by the defendant to the police were obtained in violation of Miranda?

⁷ Neither the testimony of the officers, nor the record in this case, reflects that the police advised the defendant of his Miranda rights.

⁸ Officer Jefferson obtained the defendant's identification following the arrest, and utilized it in completing his paperwork.

⁹ Officer Jefferson made no mention of this conversation in his report following the incident. The government indicated that it had not been made aware of the statement at the time it filed its response to the defendant's motion to suppress.

A. Probable Cause to Arrest

It has been a deeply rooted common law tradition "that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." U.S. v. Watson, 423 U.S. 411, 418 (1976). "The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony [committed in public]." Id. at 417 (citing Carroll v. U.S., 267 U.S. 132, 156 (1925)).

A police officer has probable cause to make an arrest if "at the moment the facts and circumstances within [the officer's] knowledge . . . were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." Beck v. State of Ohio, 379 U.S. 89, 91 (1964); Pyles v. Raisor, 60 F.3d 1211, 1215 (6th Cir. 1995). "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Illinois v. Gates, 462 U.S. 213, 244 n.13 (1983).

The defendant asserts that Officer Jefferson lacked probable cause to arrest him on the night in question. The Memphis Police Department received a call from a resident at 661 Shell Lane reporting a prowler trying to enter her home. In Tennessee, burglary of a home is classified as a Class C Felony. TENN. CODE

ANN. § 39-14-403 (2002). Officer Jefferson, upon responding to the call, saw a black male he later identified as the defendant crouching near a front window of the home.¹⁰ When the officer pulled up and pointed his spotlight at the residence, the defendant dropped a long gun, and began running. Officer Jefferson gave pursuit of the suspect, and cordoned off the area where he lost him. A trained police canine found the defendant hiding in a shed near where Officer Jefferson last saw him. Upon locating the defendant, Officer Martin testified he was wearing a white t-shirt and dark colored shorts. Finally, the defendant had in his possession a remote control belonging to a television set inside the residence at 661 Shell Lane. In this case, it is submitted that Officer Jefferson did possess probable cause to arrest the defendant for the felony of burglary committed in his presence.

Even if Officer Jefferson's observations failed to rise to the level of probable cause to arrest the defendant for burglary, the officer was justified in stopping and detaining the defendant for questioning. "A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of

¹⁰ At the suppression hearing Officer Jefferson stated the defendant was crouching by the window when he first saw him. Defense counsel, on cross examination, asked Officer Jefferson whether he testified at the preliminary hearing that the defendant was climbing out of the window when he arrived. Officer Jefferson responded that it appeared the defendant was coming out of the window, but he did not actually see the defendant crawling out of the window.

investigating possibly criminal behavior even though there is no probable cause to make an arrest." Terry v. Ohio, 392 U.S. 1, 22 (1968); U.S. v. Hensley, 469 U.S. 221, 226 (1985) (stating that the crime does not have to be ongoing, and officers may stop persons suspected of past criminal activity).

Officer Jefferson was dispatched to a possible burglary in progress call, and upon arriving saw a man crouching in the bushes apparently armed. The defendant's actions up to this point, at a minimum, justify the officer in detaining him for further investigation. However, when the defendant took off running on foot, he committed the crime of misdemeanor evading arrest. TENN. CODE ANN. § 39-16-603(a)(1) (2002) (Class A misdemeanor). Yet another reason for Officer Jefferson to place the defendant under arrest. When the defendant fled from Officer Jefferson in a vehicle, the officer had probable cause to arrest the defendant for the additional charge of felony evading arrest. TENN. CODE ANN. § 39-16-603(b)(1) (2002) (Class E felony).

It is submitted that Officer Jefferson possessed probable cause to believe that the defendant had committed, or was in the process of committing, a burglary of the residence. Accordingly, it is further submitted that Officer Jefferson was permitted to arrest the defendant without a warrant for the felony of burglary committed in his presence. Even if the officer lacked sufficient probable cause to justify an arrest for felony burglary, it is

submitted that he did have sufficient probable cause to arrest for both misdemeanor and felony evading arrest.

B. Suppression of the Fruits of the Warrantless Arrest

In order for a fleeing suspect to be considered "seized" for purposes of the Fourth Amendment, there must be "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." California v. Hodari D., 499 U.S. 621, 626 (1991). Evidence discarded by a fleeing suspect not yet in custody is admissible against him, as there has been no seizure under the Fourth Amendment. Id. at 629; U.S. v. Bradshaw, 102 F.3d 204, 213 (6th Cir. 1996). Merely showing authority or the yelling of "stop" by the police does not rise to the level of a seizure. Hodari D. at 626.

The defendant, upon seeing the officer, threw down the long gun and fled. The officer never applied physical force to the defendant or otherwise restrained his movement at the moment the defendant discarded the gun. See Id. at 625. It is submitted that since the defendant was not "seized" when the long gun was discarded, the gun should not be suppressed.

"[A] search without warrant incident to an arrest is dependent initially on a valid arrest." U.S. v. Rabinowitz, 339 U.S. 56, 60 (1950). The Supreme Court, in U.S. v. Robinson, 414 U.S. 218, 224 (1973), set forth the following:

It is well settled that a search incident to a lawful arrest is a traditional exception to the

warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest.

In addition, upon lawfully arresting a defendant, the police may contemporaneously search, without a warrant, the area within his immediate control for evidence or weapons. Chimel v. California, 395 U.S. 752, 762-63 (1969). The need for such searches is not limited to only the search for weapons to protect police officers, but applies equally to the preservation of evidence. Robinson, 414 U.S. at 234. "[T]he authority to conduct a search incident to an arrest, once established, still exists even after the need to disarm and prevent the destruction of evidence have been dispelled." U.S. v. Kaye, 492 F.2d 744, 746 (6th Cir. 1974).

Officer Martin testified that upon entering the shed where the defendant was hiding, she observed an object lying on the floor next to him. After taking the defendant into custody, officers entered the shed to retrieve this item, a television remote taken from the residence at 661 Shell Lane. It is submitted that the seizure of the television remote was conducted incident to a lawful arrest, therefore it should not be suppressed.

C. Suppression of the Statements Made by the Defendant to the Police

The Fifth Amendment to the United States Constitution requires that in any criminal case the accused not be compelled to provide testimony against himself. U.S. CONST. amend. IV. "When an

individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is [implicated]." Miranda v. Arizona, 384 U.S. 436, 478 (1966). If a person is in custody and subjected to interrogation, the police must inform the defendant of his right to remain silent, that anything he says will be used against him in court, that he has the right to have counsel present during the interrogation, and that if he cannot afford an attorney, one will be provided. Id. at 467-473. "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Id. at 475.

In determining whether a person was "in custody" for purposes of Miranda requires the examination of two factors: (1) the circumstances surrounding the interrogation, and (2) "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995); U.S. v. Salvo, 133 F.3d 943, 948-949 (6th Cir. 1998). After these two factors are considered, the court should finally apply an objective test by asking "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (citing Oregon v. Mathiason, 429 U.S. 492, 495

(1977)).

There is little doubt that the defendant was in custody at the time he made the statements to Officer Jefferson, and the parties have not argued otherwise.¹¹ He had been physically subdued by officers, handcuffed, and placed in the backseat of a patrol car. U.S. v. McDonald, 165 F.3d 1032, 1035 (6th Cir. 1999).

In order for the mandates of Miranda to be applicable, the defendant must not only be in custody, but subjected to interrogation by the police. Rhode Island v. Innis, 446 U.S. 291, 300 (1980). Interrogation occurs "whenever a person in custody is subjected to either express questioning or its functional equivalent." Id. at 300-301. The Supreme Court made clear in Miranda the following:

Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

¹¹ See Motion to Suppress Fruits of Illegal Arrest, Statements of Defendant, D.E. 32; Response of United States to Defendant's Motion to Suppress, D.E. 33.

Miranda, 384 U.S. at 478 (footnote omitted). "As a general rule, when a defendant is in custody, law officials must give him appropriate Miranda warnings before interrogation begins" U.S. v. Clark, 982 F.2d 965, 967 (6th Cir. 1993). Routine booking questions or biographical inquiries posed to a defendant in custody do not rise to the level of interrogation for Miranda purposes.¹² Id. at 968.

Although the officer's never mirandized the defendant, Officer Jefferson stated that he posed no questions to the defendant following the arrest. The defendant asked the officer to loosen the handcuffs. Officer Jefferson, without speaking, complied with this request. It was at this time that the defendant volunteered the question of whether he was the only one the police caught. Officer Jefferson's response was simply to answer this question by stating "yes." It is submitted that the defendant himself initiated contact with the officer, therefore the defendant volunteered the statements under the framework of Miranda. Id.

RECOMMENDATION

It is submitted that the officer possessed probable cause to arrest the defendant. In addition, the defendant discarded the

¹² At the suppression hearing defense counsel, upon cross examining Officer Jefferson, implied that the officer had to ask the defendant his name and other identifying information while sitting in the cruiser. Even if Officer Jefferson asked the defendant his name and other identifying information while seated in the cruiser, there would still be no Miranda violation.

long gun prior to being seized by the police, therefore it should not be suppressed. It is further submitted that the television remote control was obtained during a search incident to a lawful arrest, and should not be suppressed. Finally, the statements made by the defendant to the police were not the result of interrogation, and should not be suppressed.

Respectfully submitted this _____ day of July, 2003.

TU M. PHAM
UNITED STATES MAGISTRATE JUDGE